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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1949~~ 1950

No. 133

NORTON COMPANY, a corporation,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Norton Company, a corporation, by Roland Towle, its counsel, respectfully shows to this honorable court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Supreme Court of Illinois, in a decision which became final March 20, 1950 (R. 128), held that the State of Illinois could levy its retailers' occupation tax on a corporation for the privilege of doing an interstate business. Since the decision, which is reported in 405 Ill. 314,

affects the title, rights, privileges and immunities of Norton Company, it files this as its petition to review said decision.

There is no controversy concerning the facts. Norton Company is a Massachusetts corporation. It manufactures and sells grinding wheels, abrasive products and grinding machinery. Its manufacturing plant and main office are at Worcester, Massachusetts. The orders involved were all accepted in Massachusetts, the goods ordered were all manufactured in Massachusetts and were all shipped from there to Illinois customers in interstate commerce. Norton Company also has a warehouse in Illinois from which it does an intrastate business in Illinois. (R. 12)

This case arose when Norton Company filed with respondent its claim for credit for Illinois retailers' occupation taxes paid which were actually not due. The claim is in the sum of $100,692.01 (R. 30) and was based on sales, the orders for which were accepted in Massachusetts, the goods for which were manufactured in Massachusetts and shipped from there to Illinois customers in interstate commerce. (R. 12) No part of its claim was based on its intrastate business. (R. 12) The tax concerning the intrastate business was promptly paid and is not here involved. Hearings were had on the claim which resulted in a final administrative decision of respondent disallowing the claim to the extent of $96,581.90 (R. 11), although all the orders involved therein were accepted in Massachusetts, all the goods were manufactured there and Norton Company as to all such sales was admittedly engaged in interstate commerce. (R. 131)

Norton Company duly appealed to the Circuit Court of Sangamon County, Illinois. In its complaint it set forth the following specification of errors, *inter alia*, to-wit: "said decision violates section 8 of article I of the constitution of the United States; it is contrary to the pro-

visions of the Illinois retailers' occupation tax act and the refusal to allow petitioner's claim in its entirety constituted an attempt by Illinois illegally to tax interstate commerce." (R. 2)

The Circuit Court, although finding that the goods had been shipped in interstate commerce, affirmed the administrative decision and held the sales were taxable under the Illinois occupation tax act. (R. 5)

An appeal to the Supreme Court of Illinois then followed. (R. 7) The Illinois Supreme Court, in its opinion, pointed out that Norton Company raised the question of the validity of the tax because it *is* a burden on interstate commerce as prohibited by section 8 of article I of the federal constitution and said:

> "* * * It is the contention of appellant that the receipt of orders through its home office or through the Chicago office, followed by the shipment of the article directly from the factory in Massachusetts to the customer in Illinois, does not constitute the doing of business in Illinois so as to make such sales subject to the Retailers' Occupation Tax Act. The corporation further contends that such sales are specifically excluded from tax liability by the act. Also, it is claimed that such a tax is a burden upon interstate commerce which is prohibited by section 8 of article I of the Federal constitution.
>
> The primary question before this court is whether the retailers' occupation tax, based upon sales of goods for consumption in Illinois, as represented by shipments of appellant from its plant in Massachusetts, infringes on the commerce clause of the Federal constitution by laying a burden on interstate commerce. Section 8 of article I of the constitution, declares: 'The Congress shall have Power * * *; To regulate Commerce with foreign Nations, and among the several States, * * *'. When the State of Illinois imposes a tax for State purposes, does this tax impinge upon the power granted to the Federal government to regulate commerce by the aforementioned clause? * * * There

is no doubt that we are dealing with interstate commerce in the present case." (R. 128)

The Supreme Court of Illinois in its opinion said the point to be considered is whether interstate commerce is unconstitutionally burdened by the state regulation and concluded that it was not. It held that the interstate commerce of a foreign corporation which also does an intrastate business in the state of Illinois is taxable because the intrastate business is taxable. In so holding, the court passed on the federal constitutional question raised by petitioner, construed the state statute as authorizing the imposition of a state tax on the privilege or occupation of engaging in interstate commerce and yet held that the statute, as thus construed, did not violate the federal constitution.

JURISDICTIONAL STATEMENT.

It is contended that this court has jurisdiction under section 1257 (3), title 28 United States Code, Judiciary and Judicial Procedure.

The state statute involved is the Illinois retailers' occupation tax act (chapter 120, Illinois Revised Statutes, 1949, section 440, *et seq.*), and is to be found in volume 2 of Illinois State Bar Association Edition of Illinois Revised Statutes, 1949, page 787. The pertinent sections are listed in the appendix hereof.

Section 2 of said act, which is directly involved, is as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to

July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States be made the subject of taxation by this State."

The tax is an occupation tax and is not a sales or use tax.

The opinion of the Supreme Court of Illinois was rendered January 18, 1950. On a petition for rehearing duly filed, the opinion was modified by deleting therefrom one sentence. In addition thereto, one of the justices then dissented from the opinion. The petition for rehearing was denied March 20, 1950, and the opinion thereupon became final. The Supreme Court of Illinois is the court of last resort in the state of Illinois.

The federal question was specifically raised at the inception of the filing of the claim. The complaint, as above set forth, raised the federal question, the briefs of petitioner also raised the federal question and the Supreme Court of Illinois, in its opinion as above set forth, showed petitioner contended that the tax involved was a burden on interstate commerce and was prohibited by section 8 of article I of the federal constitution. The federal question was an issue before the court and was the basis for its decision. Since the title, rights, privileges and immunities of petitioner were specifically set up and claimed from the inception of the claim and throughout the entire proceeding and were the basis of the decision of the Illinois Supreme Court, it is respectfully submitted that this court has jurisdiction to review its judgment.

Your petitioner presents to this court and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the Supreme Court of Illinois.

QUESTIONS PRESENTED.

1. May the State of Illinois, impose its retailers' occupation tax on a Massachusetts corporation for the privilege of doing an interstate business because that company also does an intrastate business in Illinois upon which it pays such privilege tax to Illinois?

2. Does the Illinois retailers' occupation tax, as imposed on admittedly interstate commerce, constitute an unconstitutional burden upon interstate commerce?

REASONS FOR THE ALLOWANCE OF THE WRIT.

The reasons relied upon by petitioner for the allowance of the writ are as follows:

1. The Supreme Court of Illinois has decided federal questions in a manner which conflicts with the decisions of this court.

2. The Supreme Court of Illinois, in holding that the Illinois retailers' occupation tax act validly imposes a tax on the privilege or occupation of doing an interstate business, has decided a federal question of substance.

3. The decision of the Supreme Court of Illinois is in direct conflict with *Cooney* v. *Mountain States Telegraph Co.*, 294 U.S. 384, *Looney* v. *Crane*, 245 U.S. 178, *Leloup* v. *Port of Mobile*, 127 U.S. 640, *Crenshaw* v. *Arkansas*, 227 U.S. 389, *Freeman* v. *Hewit*, 329 U. S. 249, and many other decisions of this court.

4. The opinion of the Illinois Supreme Court is also in direct conflict with an earlier opinion of the Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals had before it the very same Illinois retailers' occupation tax act. In that case, *In re Globe Varnish Co.*, 114 Fed. (2d) 916, it held that Illinois could not, under the act, tax interstate commerce. In so holding, it followed the decisions of this court. Confusion will continue to exist until this court resolves the problem.

5. The questions involved are substantial, not only in the amount of the claim of the Norton Company, but in the effect the opinion will have on all foreign corporations doing both an intrastate business in Illinois and an interstate business.

6. Since historically this court has acted to resolve conflicts in jurisdiction and to settle important principles of law, the writ prayed for should issue, not merely for the purpose of examining into the matters of the instant case, but for the benefit of other state courts which may be in doubt if the opinion involved is permitted to stand or which may be encouraged to follow Illinois in its attempt to tax the privilege of engaging in interstate commerce.

7. While this court has permitted states, by means of a use tax, a sales tax, and a manufacturer's tax, to reach articles which have moved or are about to move in interstate commerce, and has permitted the *ad valorem* taxing of property used in interstate commerce, this court has never permitted a state to go so far as to tax the privilege or occupation of doing an interstate business.

WHEREFORE, your petitioner prays that a writ of certiorari issue, directed to the Supreme Court of Illinois, to the end that this cause may be reviewed and determined

by this court, that the judgment below be reversed by this court and that petitioner may be granted such other and further relief as to the court shall seem meet.

Dated this 6th day of June, 1950.

NORTON COMPANY, *a corporation,*
Petitioner,

By ROLAND TOWLE,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Illinois in this cause (R. 128) is reported in 405 Ill. 314.

JURISDICTION.

The judgment of the Supreme Court of Illinois became final March 20, 1950, when a petition for rehearing was denied. (R. 128)

The statutory provision which is believed to sustain the jurisdiction of this court is section 1257 (3) of title 28, United States Code, Judiciary and Judicial Procedure. This petition is filed within ninety days of the entry of such final judgment. Sec. 2101 (c) Judicial Code. The issue below was whether the Illinois retailers' occupation tax, as applied, is repugnant to the federal constitution and whether or not the title, rights, privileges and immunities of Norton Company have been violated by the decision of the Illinois Supreme Court. A statement of the proceedings below leading to the final judgment of the Supreme Court of Illinois is contained in the preceding petition which is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE.

Petitioner is incorporated under the laws of the state of Massachusetts and manufactures and sells grinding wheels, abrasive products and grinding machines. It has its manufacturing plant and main office in Worcester, Massachusetts (R. 12), where the general ledgers, books, records and invoices are kept and collections are made. (R. 17) It manufactures approximately 225,000 items and since some of the items are sold repeatedly, it keeps approximately 18,000 items on hand in its inventory at Worcester. (R. 17)

It is authorized to do business as a foreign corporation in the state of Illinois and maintains an office and warehouse in Chicago where it keeps on hand an inventory of approximately 3,000 items. (R. 17)

The orders involved were all accepted in Massachusetts, and the goods involved were all manufactured in Massachusetts and shipped in interstate commerce to customers located in Illinois. (R. 12) The state Supreme Court, in

its opinion, said there was no doubt that we are dealing with interstate commerce in the present case. (R. 131)

Petitioner concedes its intrastate business in Illinois is taxable under the retailers' occupation tax act but contends that the state of Illinois cannot tax the privilege or occupation of doing an interstate business. There is no dispute as to the facts in this case. A more detailed summary of the facts is set forth in the preceding petition.

SPECIFICATIONS OF ERROR.

The Supreme Court of Illinois erred in declining to follow the principles established by this court in many cases in which the states have been denied the right to tax the privilege or occupation of engaging in interstate commerce.

It erred in holding that the State of Illinois may tax the privilege of engaging in interstate business by a foreign corporation which also did an intrastate business in Illinois upon which it paid a privilege tax levied by that state.

It also erred in holding that the Illinois retailers' occupation tax act, now construed as applying to the interstate business of petitioner, is not repugnant to the commerce clause of the federal constitution.

ARGUMENT.

I.

The Supreme Court of Illinois erred in declining to follow the principles established by this court to the effect that no state can tax the privilege or occupation of engaging in interstate commerce.

The opinion of the Supreme Court of Illinois is contrary to the decisions of this court expressed again and again to the effect that the several states cannot tax the occupation or privilege of engaging in interstate commerce. The fact that Norton Company was doing an intrastate business in Illinois does not cure the defect. In *Freeman v. Hewit*, 329 U. S. 249, this court said, at page 254:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the commerce clause. Of course a state is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade."

In *Philadelphia and S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, this court said, "taxation does amount to regulation."

If the opinion of the Supreme Court of Illinois is permitted to stand, it will open up to the states an entirely new field of taxation and one which has heretofore been

repeatedly protected by this court. Among the many cases in which this court has held the states cannot thus tax interstate commerce are:

Cooney v. *Mountain States Telegraph Co.*, 294 U. S. 384.

Looney v. *Crane*, 245 U. S. 178.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292.

Brimmer v. *Rebman*, 138 U. S. 78.

Leloup v. *Port of Mobile*, 127 U. S. 640.

In *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384, Mr. Chief Justice Hughes, speaking for the court, said at page 392:

> "There is no question that the State may require payment of an occupation tax from one engaged in both intra-state and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup* v. *Port of Mobile*, 127 U. S. 640."

In *Looney* v. *Crane*, 245 U. S. 178, we find Crane Company was an Illinois corporation which carried on its manufacturing business, not only in Illinois, but in other states by shipment of merchandise on orders obtained from other states. Crane Company had a warehouse in Texas, from which it did an intrastate business in Texas. Texas attempted to tax the interstate business of the Crane Company and contended that the interstate business could be taxed because Crane Company did an intrastate business in Texas. The court said, at page 187:

> "This view can only be sustained upon the assumption that the limitations of the constitution of the United States are not paramount but subordinate to and may be set aside by state authority as a result of the exertion of a local power. . . . But original discussion

is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established."

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, the court, in speaking of a mercantile tax measured on the volume of business transacted both in intrastate and interstate commerce, said at page 297:

> "That it applies to internal as well as to foreign commerce cannot save it; for as was said in case of the State Freight Tax 15 Wall. 232, 277, 'The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions, subjects within the domain of the state.'"

In *Brimmer* v. *Rebman*, 138 U. S. 78, the court said, at page 82:

> "Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to citizens of all states including Virginia; for a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to all people of all states including the people of the state enacting such statute."

In *Leloup* v. *Port of Mobile*, 127 U. S. 640, the court said at page 648:

> "No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, *or on the occupation or business of carrying it on*, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (Italics supplied by Counsel.)

Since this court in these and many other cases has uniformly held that the commerce clause of the federal con-

stitution prevents the several states from taxing the privilege of doing an interstate business, petitioner respectfully requests this court to grant a writ of certiorari.

II.

The Illinois Supreme Court, in holding that a state may tax a foreign corporation on the privilege or occupation of engaging in interstate commerce, decided a federal question of substance.

While the amount of the disputed portion of the claim of Norton Company in the sum of $96,581.90 is substantial, more important is the fact that, if the opinion of the state court is permitted to stand, it will affect every foreign corporation which also does an intrastate business.

Since this court acts to resolve conflicts in jurisdiction and to settle important principles of law, Norton Company earnestly requests this court to issue a writ of certiorari not only that this particular case may be examined, but also for the guidance of such other state courts as may be in doubt if the opinion involved is permitted to stand or be encouraged to rule as did the Supreme Court of Illinois.

As was said in *Freeman* v. *Hewit* (1947), *supra*, page 251:

> "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and of the constituent States."

It is quite apparent the decision of the State Supreme Court is another in a long list of attempts to encroach on the federal power to control interstate commerce.

The federal and state appellate courts, the state legislatures and all others interested in this problem will await the court's opinion on this important attempt of a state to encroach on the federal power over interstate commerce. That it is a matter of substance, there is no doubt. If this latest attempt to encroach on the federal power is permitted to stand a flood of litigation can be expected to follow. This court should again state its thoughts on the subject for the benefit of all those interested in this field.

The fact that this court has permitted states to tax articles which have moved or are about to move in interstate commerce and has permitted ad valorem taxing of property used in interstate commerce, may have encouraged the Supreme Court of Illinois to make this further attempt to control interstate commerce. It would seem that the set of facts herein involved presents a unique opportunity for a decision which would be a guide for all those interested in this problem.

CONCLUSION.

Since the opinion of the Supreme Court of Illinois is contrary to many decisions of this court, a conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit exists, the federal questions involved are matters of substance, the federal constitution is directly involved, and it is the right of this court to resolve these problems, it is respectfully submitted that a writ of certiorari be granted.

Dated this 6th day of June, 1950.

Respectfully submitted,

ROLAND TOWLE,
Counsel for Petitioner.

APPENDIX.

Illinois Retailers' Occupation Tax.

(Chapter 120, Section 440, et seq., Volume 2, Illinois Revised Statutes, 1949, page 778, et seq.)

An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers or use or consumption. (Approved June 28, 1933, as amended. L. 1933, p. 924.)

Be it enacted by the people of the state of Illinois, represented in the General Assembly:

441. Tax imposed on business of selling tangible personal property at retail.) sec. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State. As amended by act approved May 29, 1941. L. 1941, vol. 1, p. 1079.

441b. Revocation of certificate of regisration.) Sec. 2b. The Department may, after notice and a hearing as pro-

vided herein, revoke the certificate of registration of any person who violates any of the provisions of this Act. . . .

445. Erroneous payment of tax, penalty or interest—Credit or refund.) Sec. 6. If it shall appear, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum to the person who made the erroneous payment or, in the event that such person shall have died or become incompetent, to such person's legal representative, as such. The amount of such credit memorandum shall be credited against any tax or penalty due or to become due under this Act from the person who made the erroneous payment. If no tax or penalty is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or either, the credit memorandum so issued may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to the provisions of this Act, and the amount thereof applied by the Department against any tax or penalty due or to become due under this Act from such assignee. * * *

445a. Claims for credit.) Sec. 6a. Claims for credit shall be prepared and filed upon forms provided by the Department. . . . .

445b. Tentative determination of claim—Notice—Hearing—Review.) Sec. 6b. As soon as practicable after a claim for credit is filed the Department shall examine the same and determine the amount of credit to which the claimant or the taxpayer's legal representative, in the event that the taxpayer shall have died or become incompetent, is en-

titled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. If such claimant, or the legal representative of a deceased or incompetent taxpayer, shall within twenty (20) days after the Department's notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent taxpayer, of the time and place fixed for such hearing, and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent taxpayer. The Department's Final Determination may be reviewed by the proper Circuit or Superior Court, in the same manner, within the same time, upon the same terms and conditions and to the same extent, as provided by Section 12 of this Act. Appeals from final orders or judgments of such courts shall be taken as in said Section 12 is provided. Added by act approved July 21, 1947. L. 1947, p. 1458.

The Circuit or Superior Court of the County wherein the taxpayer has his principal place of business, or of Sangamon County in those cases where the taxpayer does not have his principal place of business in this State, shall have power to review all final administrative decisions of the Department in administering the provisions of this Act.

Appeals from all final orders and judgments entered by the Circuit or Superior Court upon review of the Department's determination in any case shall be taken directly to the Supreme Court by either party to the proceeding, and shall be governed by the rules applicable to civil cases appealed to said Supreme Court. The remedy herein provided for appeal shall be exclusive.

* * * * *

452. Violations—Penalties.) Sec. 13. Any person engaged in the business of selling tangible personal property at retail in this State who fails to make a return, or to keep books and records as required herein, or who makes a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions of this Act, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who signed a fraudulent return made on behalf of such corporation, or any itinerant vendor, as herein defined, who after notice fails to file the bond required by Section 12½ of this Act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five thousand ($5,000.00) dollars, or be imprisoned in the county jail for not less than one (1) month nor more than six (6) months, or be both so fined and imprisoned, in the discretion of the court.

Any person who violates any provision of Section 2a of this Act is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or be imprisoned in the county jail not more than six (6) months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person engaged in business in violation of said Section 2a shall constitute a separate offense.

453. Title of Act—Tax additional.) Sec. 14. This Act shall be known as the "Retailers' Occupation Tax Act" and the tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.